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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEB 5 1997

In the Matter of)
)
Geographic Partitioning and Spectrum) WT Docket No. 96-148
Disaggregation by Commercial Mobile)
Radio Service Licensees)
)
Implementation of Section 257 of the) GN Docket No. 96-113
Communications Act --)
Elimination of Market Entry Barriers)

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

PETITION FOR RECONSIDERATION

Omnipoint Corporation ("Omnipoint"), by its attorneys and pursuant to Section 1.429 of the Commission's rules, files this petition for reconsideration of the Commission's Report and Order ("R&O").¹ Omnipoint commends the Commission for adopting partitioning and disaggregation rules that generally allow for increased flexibility for PCS providers by encouraging a wider range of more efficient wireless services to underserved areas. Omnipoint requests reconsideration of two aspects of the R&O in order to facilitate more efficient post-auction market structuring in PCS: (1) permitting a Block F licensee, post-auction, to swap its license with another 10 MHz licensee (Block D or E) in the same BTA; and (2) relieving parties of the unnecessary application requirement to disclose the underlying contracts and agreements between the private parties (47 C.F.R. § 1.2111(a)).

¹ In the Matter of Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Service Licensees, Report and Order and Further Notice of Proposed Rulemaking, WT Docket No. 96-148, 62 Fed. Reg. 653 (January 6, 1997).

I. Block F Licensees Should Be Allowed to "Swap" Their License For Either the Block D or E License In the Same BTA

At ¶ 54 of the R&Q, the Commission declined to adopt Omnipoint's proposal "to permit entrepreneur block licensees to swap equivalent blocks of entrepreneur spectrum with non-entrepreneurs within the same market" because doing so would be an administrative burden on the Commission. Omnipoint respectfully submits that, by limiting "swapping" to Block F licensees, there would be very little administrative burden and substantial public interest benefits to be obtained.²

Specifically, Omnipoint proposes that the entrepreneur holding the F block license should be permitted to swap its 10 MHz for either the D or E block license in the same BTA, regardless of whether the holder of the D or E blocks spectrum has entrepreneurial status.³ The spectrum swap proposal is intended only in the *post-auction* PCS marketplace, after the players in each market are identified. This proposal does not suggest any alterations in any of the PCS licensees' auction obligations to the government; the entrepreneur would continue to pay according to the terms and conditions of the Block F installment payment plan and the new Block F assignee would obtain no new rights to "entrepreneur" status.

As Omnipoint explained in its comments and reply comments, spectrum swapping will allow the licensees in a given market to diminish the adjacent channel interference issues that will inevitably arise in a given market. A very serious problem of adjacent channel interference currently looms over the PCS industry because disparate transmission technologies will be

² In response to the Commission's concern, Omnipoint has revised its position in the comments and, on reconsideration, does not specifically request that Block C licensees also be permitted to spectrum "swap" with in-region Block A or B licensees.

³ The spectrum swap would be processed by the filing of two voluntary assignment applications, pursuant to Section 24.839 of the Commission's rules.

operating in close proximity both geographically and on contiguous bands of the PCS frequencies. As can be seen by the attached Diagram 1 of the PCS band plan, it is quite possible that incompatible technologies operating next to one another could severely reduce the value and usefulness of a 10 MHz license. This problem can be diminished through spectrum swaps of the 10 MHz licenses. For example, by permitting a Block F licensee to reverse positions with the Block D licensee, the parties will often be able to minimize interference problems by grouping licensees with compatible technologies together. This, in turn, is likely to reduce the incidence of lengthy interference proceedings at the Commission. Further, because it can reduce build-out and interference controversies and expenses, the swapping proposal can expedite competitive PCS service to the public and reduce overall costs of PCS service.⁴ Finally, because the small business voluntarily relocates under circumstances that are beneficial to it, the swapping process improves small business participation in PCS and/or improves that licensee's financial position without changing the financial obligations or status of any party.⁵

Omnipoint believes that the Block F swapping proposal would involve no risk to the public interest or the Commission's PCS entrepreneur-band rules and policies. The Block C and F set-aside was intended to permit small businesses and other entrepreneurs an opportunity to compete *in the auction* without having to bid against large telecommunications companies with vast resources.⁶ Because the Block F swapping proposal can only be employed in the post-

⁴ See, e.g., Memorandum Opinion and Order, GN Dkt. No. 90-314, 9 FCC Rcd. 4957 (1994).

⁵ As discussed below, Omnipoint does not suggest that the Block F licensee engage in any unjust enrichment or otherwise "cash out" on its entrepreneur status. Rather, to the extent that one or more parties in the market are better off by the swap, it should be able to compensate and reward the Block F licensee financially for such a swap.

⁶ Fifth Report and Order, PP Dkt. No. 93-253, 9 FCC Rcd. 5532, ¶ 121 (1994).

auction context, it does not threaten the admirable objectives of the Block C and F set-aside.⁷ Further, no issues of unjust enrichment arise because the Block F licensee continues as a 10 MHz licensee in the same BTA market; *the proposal is for an even swap*, not for the small business to "cash out" or otherwise profit from its status as a small business licensee. *In fact, this proposal is only to extend to Block F licensees the same opportunities for swapping that are today available under the Commission's rules for Block D and E licensees.* Finally, the fact that a non-entrepreneur would hold the Block F spectrum, 1890-95 and 1970-75 MHz, does not contradict any Commission policy because (a) there is no characteristic inherent in that spectrum block, as opposed to the Block D (1865-70, 1945-50 MHz) and Block E (1885-90, 1965-70 MHz), which is especially suited for small businesses,⁸ and (b) there has been no reduction in the allocation of 40 MHz for broadband PCS entrepreneurs, only a post-auction rearrangement of the spectrum.

Omnipoint also respectfully submits that the Block F swap proposal would be less administratively burdensome for the Commission than the adopted partitioning and disaggregation assignment processes. The U.S. Treasury still collects the same amount of money, from the same original licensee, in the same time-frame, and at the same rate of interest.⁹ The Commission need not re-investigate the entrepreneur status or other qualifications of the two parties since both would be current FCC licensees, and the construction requirements would

⁷ For years, Omnipoint has consistently supported the PCS entrepreneur's band and its proposal herein further supports viable opportunities for small businesses as PCS licensees.

⁸ Further, in the orders establishing the PCS band plan, the Commission cited no particular characteristic of the Block F spectrum that would address issues relevant to small businesses. *See, e.g., Second Report and Order*, GN Dkt. No. 90-314, 8 FCC Rcd. 7700 (1993); Memorandum Opinion and Order, GN Dkt. No 90-314, 9 FCC Rcd. 4957 (1994).

⁹ Likewise, the new Block F assignee's obligations do not change either. Therefore, because the assignee has already paid its auction obligation for the Block D or E spectrum to be swapped, it would take on no new auction payment obligations as a result of the swap. 47 C.F.R. § 1.2109(a).

remain the same. Presumably, once the assignment applications have been processed in the same manner as any other PCS assignment application,¹⁰ the Commission would need only re-issue the signed Notes and Security Agreements with a new license number on the top of page one of each document.¹¹ This is simply not a significant burden, especially when compared with the partitioning or disaggregation assignment application process that has already been adopted.

II. Parties to Partitioning and Disaggregation Agreements Should Not Be Required To Submit Contracts or other Related Documents

As adopted by the R&O, the partitioning/disaggregation process would require the filing of an FCC assignment application (FCC Form 401) pursuant to the Commission's PCS assignment rule, 47 C.F.R. § 24.839.¹² Section 24.839 requires compliance with Section 1.2111(a), which requires an applicant for partial assignment to file with the Commission "the associated contracts for sale, option agreements, management agreements, or other documents" relating to the agreement made between the two parties. Omnipoint believes that this rule is unnecessary, and that parties should not be required to submit such competitively sensitive documents.

¹⁰ The Commission recovers the cost of processing the assignment application through its application filing fee of \$280. With spectrum swapping, the two assignment applications will generate twice the filing fee revenue.

¹¹ In comparison, the Block F partitioning and disaggregation that the Commission has approved in the R&O would involve recalculation of the pro rata portion of each licensee's obligations and the issuance of modified payment schedules.

¹² R&O, App. B, 47 C.F.R. § 24.714(a) ("Parties seeking approval for partitioning and disaggregation shall request an authorization for partial assignment of a license pursuant to § 24.839.").

While Section 1.2111(a) was adopted in order to prevent unjust enrichment and to fulfill the statutory obligations of Section 309(j)(4)(E) of the Communications Act,¹³ the Commission's partitioning and disaggregation rules already fully address unjust enrichment concerns. Section 24.714(a)(3) prohibits disaggregation or partitioning of entrepreneur spectrum to non-entrepreneurs "for the first five years of the license term," consistent with the Commission's prohibition on outright assignments of entrepreneur licenses. Compare R&O, App. B, 47 C.F.R. § 24.714(a), with, 47 C.F.R. § 24.839(d). The partitioning and disaggregation rules also fully address unjust enrichment that could arise under the auction installment plan.¹⁴ With those rules in place, there is no need for the Commission to review the underlying private arrangements and contracts struck between the two parties. So long as the two parties are otherwise qualified licensees, there is no purpose in requiring the filing or review of additional paperwork.¹⁵ If, during the Commission's review of the application, a particular issue arises as to the underlying documents, the Commission could also request the applicant to disclose such documents on an *ad hoc* basis.

Public disclosure of contracts and agreements as part of *every* assignment application filed, however, does burden the parties involved in such an arrangement, and would generally deter partitioning/disaggregation activity. The information in such agreements and contracts would undoubtedly be competitively sensitive to both parties and its disclosure would inflict a

¹³ Second Report and Order, PP Dkt. No. 93-253, 9 FCC Rcd. 2348, ¶ 214-15 (1994).

¹⁴ Id. at § 24.714(d)(2) (partitionees/diaggregates not eligible for installment payments must pay the balance upfront) & 24.714(d)(3) (partitionees/diaggregates not eligible for the same installment plan as the initial licensee must pay according to an installment plan for which it qualifies).

¹⁵ Moreover, the filing of the actual signed contracts and agreements will inhibit electronic filing.

regulatory cost on the parties. While the Commission's confidentiality rules may offer some protection, parties to negotiation would have no way of determining in advance whether the Commission would approve their confidentiality request until after the material has been submitted; the parties would also have no method of legal assurance (*i.e.*, an escrow agent) that the materials would truly remain confidential. Therefore, it is in the public interest to avoid the regulatory burden associated with the disclosure requirements.

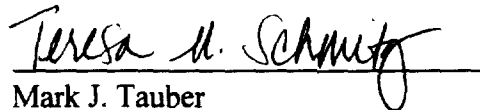
III. **Conclusion**

Omnipoint strongly supports the rules adopted in the Commission's R&O that improve PCS spectrum efficiency and urges the Commission to modify the partitioning and disaggregation processes, as discussed above.

Respectfully submitted,

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Diagram 1

